

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARL KEIR CONERLY,

Defendant-Appellant.

UNPUBLISHED

October 14, 2003

No. 239790

Oakland Circuit Court

LC No. 2001-180875-FH

Before: Kelly, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for first-degree home invasion, MCL 750.110a(2), assault with a dangerous weapon, MCL 750.82, and aggravated domestic violence, MCL 750.81a(2). We affirm.

On appeal, defendant argues that, in two instances, the trial court admitted evidence in violation of MRE 404(b). We disagree. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 549-550; 581 NW2d 654 (1998). First, defendant claims that inadmissible testimony was admitted when, during cross-examination of defendant, the prosecutor elicited from defendant that he did not change the address on his driver's license when he moved to Maryland, a misdemeanor. Defendant failed to preserve this issue on the ground that it was inadmissible under MRE 404(b) because he only objected on the ground of relevance. To preserve an issue for appeal, a party must timely object and assert the same challenge to the evidence in the trial court as asserted on appeal. See MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Therefore, review is precluded unless defendant establishes plain error that affected the outcome of the trial. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant has failed to establish such plain error.

Here, defendant's defense against the home invasion charge was that he and the victim lived together and, thus, he did not commit a "home invasion." However, the evidence included that (1) defendant's name was not on the lease, (2) he broke the door down on the night of the alleged home invasion, and (3) his driver's license did not list the address where the home invasion occurred. In an attempt to partially rebut this evidence, on direct examination, defendant indicated that he had moved a number of times and did not change the address on his driver's license. On cross-examination, the prosecutor asked defendant if he was aware that the law required that address changes be reported to reflect the proper residence and he denied

having such knowledge. After defendant's relevancy objection, the prosecutor indicated that the reason for the line of questioning was to challenge defendant's credibility – defendant had lived in Maryland for about three years and never changed his license and, in fact, renewed his Michigan license using his mother's Michigan address despite living in Maryland and knowing that he was misrepresenting his residence.

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if the evidence is “(1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, MRE 403.” *People v Ho*, 231 Mich App 178, 185-186; 585 NW2d 357 (1998). Here, if the contested testimony was characterized as MRE 404(b) evidence, it was not offered to show defendant's bad character or propensity to commit the crime. The testimony was admitted for the proper purpose of showing that defendant has previously misrepresented where he lived – a relevant issue because defendant claimed that he could not have committed the charged home invasion since he lived with the victim. Thus, defendant's claim of error fails.

Second, defendant argues that the prosecutor improperly elicited from the victim, defendant's former girlfriend, that there was an outstanding warrant for defendant's arrest in Maryland related to another instance of domestic abuse and that she had broken off her relationship with defendant because he had a substance abuse problem. Because defendant failed to object during the contested testimony, our review is for plain error. See *Carines, supra*. However, the record reveals that the victim's testimony was unexpected and unresponsive to the prosecutor's question,¹ and that defendant failed to object, failed to request that the answer be stricken from the record, and failed to request a curative instruction. “An unresponsive answer to a proper question is not usually error.” *People v Measles*, 59 Mich App 641, 643; 230 NW2d 10 (1975). These unresponsive and brief remarks did not deprive defendant of a fair trial; thus, plain error has not been shown. See *People v Burch*, 170 Mich App 772, 776; 428 NW2d 772 (1988). We also reject defendant's claim that the prosecutor was required to provide notice under MRE 404(b) regarding the substance of this unexpected testimony.

Further, generally, all relevant evidence is admissible. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Here, defendant denied committing any of the charged offenses. Defendant testified that he lived with the victim at the time of the alleged home invasion and that the reason his name was not on the lease and that the victim was denying that he lived with her was because they lived in rent subsidized housing and if his income was included as household income, they would not have been able to afford the rent. On cross-examination, the prosecutor asked defendant if the victim had broken off her relationship with him and refused to live with him because he had a substance abuse problem and defendant denied the same. After defendant's testimony, the victim was re-called as a rebuttal witness and

¹ The prosecutor had asked, “And when you came back from Maryland what was the reason the two of you didn't live together anymore?”

testified that at the time of the charged incident defendant did not live with her and that she had broken off her relationship with him because he had a substance abuse problem, did not have a “steady work ethic,” and “had a domestic abuse problem.” This rebuttal evidence was responsive to defendant’s testimony and was relevant to a material issue, i.e., whether defendant lived with the victim at the time the alleged home invasion occurred. See *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Although the victim may have responded to an appropriate question with more information than was necessary, defendant failed to object, failed to request that the answer be stricken from the record, and failed to request a curative instruction. We cannot conclude that plain error has been established.

Next, defendant argues that he was denied a fair trial because irrelevant evidence that he was “poor, unemployed or substantially in debt” was interjected into the trial. Because defendant failed to object to the admission of any of the contested evidence, our review is for plain error. See *Carines, supra*. However, after review of the record, we disagree that such evidence was improperly interjected into the trial. After defendant testified on direct examination that he and the victim had not broken off their relationship and that his name was not on the lease of the house where they allegedly lived because of his income, the prosecutor inquired as to whether defendant was in debt, to which defendant responded affirmatively. This does not constitute plain error warranting reversal. See *Carines, supra*.

Next, defendant argues that the prosecutor elicited improper testimony and made a number of improper statements to the jury that denied him due process and a fair trial. We disagree. Claims of prosecutorial misconduct are reviewed case by case, examining remarks in context to determine whether the defendant received a fair and impartial trial. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). First, to the extent that defendant claims the prosecutor acted improperly with regard to the victim’s testimony already discussed above, such claims are rejected. Defendant failed to object to the prosecutor’s questions during the contested testimony and, in any event, would have been unwarranted. The contested testimony was unexpected and unresponsive to proper questioning; therefore, defendant has failed to establish plain error. See *Carines, supra*.

Second, defendant’s cursory claim that the prosecutor’s “argument/rebuttal irreparably prejudiced defendant” is without merit. The prosecutor did not reference defendant’s alleged substance abuse problem, negative economic status, or other “bad acts” in her closing argument. To the contrary, defendant’s closing argument made reference to his alleged substance abuse problem and implied that the victim was lying about defendant living with her as evidenced by the fact that she let defendant, “this crack head that she allegedly left Maryland and came back to Michigan and didn’t wanna have anything to do with,” take care of her daughter. In rebuttal argument, the prosecutor responded to this remark by repeating the victim’s testimony that she did not want to live with defendant because he had a substance abuse problem. Even otherwise improper prosecutorial remarks may not warrant reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Further, any prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction; therefore, plain error was not established. See *Carines, supra*; *People v Shutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Finally, defendant argues that reversal is required because of the cumulative effect of errors. Because we have rejected defendant's claims of error, this issue is without merit. See *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot